

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

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<b>NANCY G. EZELL,</b>	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	No. 02-2144
	)	
<b>JO ANNE B. BARNHART,</b>	)	
<b>Commissioner of the Social Security</b>	)	
<b>Administration,</b>	)	
	)	
Defendant.	)	

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**ORDER AFFIRMING DECISION OF THE ADMINISTRATION LAW JUDGE**

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Before the Court is Plaintiff Nancy G. Ezell’s appeal of the denial of disability insurance benefits by Defendant Jo Anne B. Barnhart, Commissioner of Social Security (“Commissioner”). October 20, 1998, Plaintiff filed for disability insurance benefits based on status post sinusitis surgery, a history of gastroesophageal reflux disease, chronic pulmonary disease, adult onset asthma, and degenerative disc disease of the spine. The Commission denied Plaintiff’s initial application and her petition for reconsideration, whereupon Plaintiff timely filed a request for a hearing. On November 5, 1999, this matter was heard by an Administrative Law Judge (“ALJ”) who found that Plaintiff was not disabled within the meaning of the Social Security Act. Plaintiff appealed the decision of the ALJ to the Appeals Council, which declined to consider Plaintiff’s appeal. Plaintiff now appeals to this Court, pursuant to 42 U.S.C. § 405(g), arguing that the ALJ’s decision was not supported by substantial evidence. For the reasons stated herein, the decision of the ALJ is affirmed.

## **I. Background Facts**

Plaintiff was born on December 3, 1944. Plaintiff completed the eleventh grade and earned a general equivalency diploma. Plaintiff also received some insurance training. Plaintiff's most recent employment was with Triple A Auto Club South ("Triple A") from 1984 through 1991. Plaintiff initially worked in Triple A's membership department, which primarily entailed speaking to customers about Triple A memberships and emergency road-side assistance. Triple A subsequently transferred Plaintiff to its insurance department. Plaintiff's new position required the use of machines, tools, equipment, technical knowledge or skills, and the completion of written reports. Plaintiff also sold and gave quotes for insurance policies of all types over the telephone. Plaintiff was required to sit for eight hours a day, and reach and bend throughout the day. Plaintiff lifted and carried up to five pounds. Plaintiff ceased employment with Triple A in 1991 and has not been employed since.

Plaintiff testified before the ALJ that she stopped working at Triple A because sitting and bending all day caused her neck, back and shoulders to bother her. Tr. at 34-35. Plaintiff stated that sitting for more than ten minutes or standing for more than thirty minutes causes her "miserable" pain. Tr. at 50. Plaintiff further testified that pain from her ailments inhibits her from performing household chores, going shopping, doing yardwork, and driving. Tr. at 37, 38, 41, 52.

Nola Stackhouse, a former co-worker of Plaintiff's, testified that Plaintiff kept a space heater under her desk even in the summer because her legs were often cold and cramping. Tr. at 56. Ms. Stackhouse further testified that two times a week she would find Plaintiff lying on the couch in the break room crying because she was in so much pain. Tr. at 57.

Dr. Daniel Fearnow examined Plaintiff in March 1993 based on complaints of neck, shoulder and back pain. Tr. at 114-116. Plaintiff was also treated by a chiropractor for neck, back and spine problems from 1988 to 1997. Tr. at 252. The chiropractor treated Plaintiff with heat or ice treatments and manipulated her joints. Tr. at 37. Occasionally, Plaintiff would get relief from these treatments; other times “[she] got no relief at all.” Id. In 1994, Plaintiff was treated by another chiropractor for lower back, mid-dorsal and neck pain, Tr. at 104-108, and by Dr. Larry Yarbrow for similar pains. Tr. at 119, 122.

Notes dated September 9, 1996 from the Peabody Health Care clinic indicate that Plaintiff visited the clinic with complaints of persistent neck pain arising from a fall down the steps in Plaintiff’s home. Tr. at 186. On October 21, 1996, Dr. John Crockarell, a neurological surgeon, treated Plaintiff for complaints of neck and low back pain. Tr. at 158. Dr. Crockarell diagnosed Plaintiff with degenerative disc disease and degenerative joint disease in her cervical and lumbar spine regions. Id. At the time of the evaluation, however, there was “no evidence of subluxation or any prevertebral soft tissue abnormalities” in Plaintiff’s cervical spine. Id. In addition, Plaintiff’s lumbar spine was aligned, and most of her “vertebral bodies and disc spaces appear[ed] well maintained.” Id. There were no fractures identified in either the cervical or lumbar regions of Plaintiff’s spine. Id. Dr. Crockarell also made the following observations about Plaintiff:

This lady is noted to walk without a limp, stand without a list. Forward motion is mildly restricted. Straight leg raise is unimpressive. Reflexes are preserved in the lowers, preserved in the uppers and are symmetric. No motor deficit. She has a scar over the right brachioradialis proximally from old trauma. She has excellent shoulder motion. She has fairly normal cervical motion with maybe a slight loss of extension. No major pain is reproduced by range of motion testing.

Tr. at 182. Dr. Crockarell also “suspect[ed] that [Plaintiff was] having some radiculitis in the left upper extremity but [Plaintiff had] no overt findings of radiculopathy.” Tr. at 183. Finally, Dr. Crockarell noted that magnetic resonance imaging (“MRI”) might help to better evaluate Plaintiff’s condition and should be conducted if the radicular component of Plaintiff’s condition persisted.<sup>1</sup> Id.

On June 23, 1998, Plaintiff underwent an MRI on her cervical and lumbar spine regions. Tr. at 224. Regarding Plaintiff’s cervical spine, Dr. James Thomas observed that the “cervical spine is intrinsically normal. There are anterior bars at the C5-6 and C6-7 levels which produce very mild canal stenosis. There is no evidence of significant disc bulge, HNP or significant neural foraminal narrowing at these levels or elsewhere in the cervical spine.” Id. The MRI conducted on the lumbar spine lead Dr. Thomas to comment: “The lumbar vertebral bodies and disc spaces are well-maintained in good alignment. There is mild central disc bulge at L3-4 without focal HNP or other significant finding at this level. At the L4-5 level there is diffuse disc bulge greater on the right without focal HNP, canal stenosis or significant neural foraminal narrowing.” Id.

Dr. Fearnow treated Plaintiff for sinusitis starting in December 1992. Tr. at 116. Dr. Yarbro treated Plaintiff for sinus problems in 1994, Tr. at 119, 122, and continued to treat Plaintiff for neck and back pain into 1995. Tr. at 118. In April and June 1995, Plaintiff was treated by Dr. David Herson for sinusitis. Tr. at 145-146. To cure her sinus condition, Plaintiff underwent endoscopic sinus surgery performed by Dr. Frank Wong on April 23, 1996. Tr. at 161. When Plaintiff subsequently returned to Dr. Wong because of complaints of sore throat and hoarseness, Dr. Wong noted that Plaintiff’s sinuses were “wide open” and that her throat was “clear.” Tr. at 194. Dr.

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<sup>1</sup>Plaintiff was also evaluated by Dr. Madison Buckley on September 12, 1996. Tr. at 349. Dr. Buckley found that Plaintiff had degenerative disc disease in her cervical spine. Id. Dr. Buckley also found that Plaintiff should undergo an MRI for further neurological evaluation. Id.

Wong also noted that Plaintiff was smoking one pack of cigarettes per day. Id. By the end of 1996, Plaintiff was smoking two packs of cigarettes per day. Tr. at 52. In the early 1980s, Plaintiff was diagnosed with adult onset asthma, id., which worsened in the early 1990s. Tr. at 41. Plaintiff continues to take three medications to treat her asthma. Id.

There is no other medical evidence in the record regarding Plaintiff's treatment for her various ailments prior to December 1996.<sup>2</sup> Plaintiff did, however, continue to be treated for her illnesses subsequent to December 1996. Plaintiff testified that she continues to take asthma medication and suffers at least one asthma attack per week. Tr. at 262. In addition, Plaintiff asserts that she takes blood thinner to treat blood clotting in her legs, and in January 1998, Plaintiff was diagnosed with protein S deficiency. Tr. at 42. Plaintiff further testified that she was hospitalized for insertion of a vena cave in order to prevent the blood clots from spreading to her heart, lungs and/or brain. Tr. at 43-44. In addition, Plaintiff declared that in 1998 she was diagnosed with phlebitis of her legs. Tr. at 48. From February 1997 to April 1999, Plaintiff was treated at the UT Medical Group Pain Center ("Pain Center"). Tr. at 382. Plaintiff's complaints to the Pain Center related to neck, shoulder and lower back pain. Tr. at 276-299. The Pain Center was limited in the treatment it could provide Plaintiff because she was on anticoagulation medication. Id. However, Plaintiff experienced significant relief from her pain after iontophoresis. Id.

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<sup>2</sup>Plaintiff is entitled to benefits only if she is found disabled within the meaning of the Social Security Act during the period spanning from the onset of her disability, Social Security Report 83-20, to the last date on which she had medical insurance coverage. Higgs v. Bowen, 880 F.2d 860, 862 (6<sup>th</sup> Cir. 1988); 42 U.S.C. §423(c)(1). Thus, only if Plaintiff was found disabled from December 1991, the alleged onset date of her disability, to December 1996, the last time which she had insurance coverage, would she be entitled to disability insurance benefits. Tr. at 20, 53.

Dr. James Shull, a nontreating<sup>3</sup> physician, examined Plaintiff in December 1998. Dr. Shull's examination of Plaintiff "was limited to ... [discovering the] dexterity and the extent of endurance to which [sic] [Plaintiff] could tolerate with regard to activity/and or [sic] a work environment of any type." Tr. at 262. Thus, there was no "range of mobility testing on either the cervical or lumbar spine." Tr. at 263. Nonetheless, Dr. Shull found that the arthritis in Plaintiff's hips was "of a crippling nature." Id. Dr. Shull further found that Plaintiff "required assistance to walk and had to be assisted from a seated position. Decrease [sic] sensation was noted in both upper and lower extremities." Id. Dr. Shull reviewed Plaintiff's x-rays, whereupon he noted that she had "severe osteoarthritis in both the cervical and lumbar spine with encroachment onto the spinal cord in both areas." Tr. at 262. Dr. Shull also noted that Plaintiff had a "large duodenal ulcer." Id. Dr. Shull ultimately concluded that Plaintiff's ailments rendered her incapable for performing work of any type, and that this "status had been present for some extensive period of time." Tr. at 263.

Two medical consultants<sup>4</sup> found contrary to Dr. Shull's opinion. In a report dated December 11, 1998, one medical consultant ("MC1") found that Plaintiff could (1) occasionally lift fifty pounds, (2) frequently lift twenty-five pounds, (3) stand and/or walk for about six hours in an eight hour work day, (4) sit about six hours in an eight hour work day, and (5) push or pull without limit, other than as indicated with respect to the limitations on lifting. Tr. at 254. MC1 further found that Plaintiff had no postural, manipulative, communicative, environmental or visual limitations. Tr. at

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<sup>3</sup>"Nontreating means a physician ... who has examined [a claimant] but does not have, or did not have, an ongoing relationship with [the claimant]. The term includes an acceptable medical source who is a consultive examiner for [the Commissioner], when the consultive examiner is not [the claimant's] treating source." 20 C.F.R. § 416.902.

<sup>4</sup>Both of the medical consultants are nontreating, medical doctors who work as a part of an ALJ's team which makes disability determinations. Tr. at 260, 273; 20 C.F.R. 404.1527(f)(1).

254-256. The second medical consultant (“MC2”) agreed with MC1 that Plaintiff could (1) occasionally lift fifty pounds, (2) frequently lift twenty-five pounds, (3) stand and/or walk for about six hours in an eight hour work day, (4) sit about six hours in an eight hour work day, and (5) push or pull without limit, other than as indicated with respect to the limitations on lifting. Tr. at 267. MC2, however, found that Plaintiff had several postural limitations. That is, MC2 found that Plaintiff could climb stairs occasionally, and balance, stoop, kneel, crouch or crawl frequently. Tr. at 268. MC2 further found that Plaintiff should avoid concentrated exposure to fumes, odors, dust, gases, poor ventilation, etc. Tr. at 270. However, MC2 found that Plaintiff had no other environmental limitations, nor any manipulative, visual or communicative limitations. Tr. at 273.

## **II. Legal Standard**

The standard of review for an appeal of this nature is a limited one. This court must determine if the decision below is supported by substantial evidence. Richardson v. Perales, 402 U.S. 389, 401 (1971); Barker v. Shalala, 40 F.3d 789, 794 (6<sup>th</sup> Cir. 1994); Stanley v. Sec’y of Health & Human Servs., 39 F.3d 115, 117 (6<sup>th</sup> Cir. 1994). The reviewing court also is authorized to ensure that the correct legal standards were employed. Richardson, 402 U.S. at 401; Cutlip v. Sec’y of Health & Human Servs., 25 F.3d 284, 286 (6<sup>th</sup> Cir. 1994); Landsaw v. Sec’y of Health & Human Servs., 803 F.2d 211, 213 (6<sup>th</sup> Cir. 1986).

Substantial evidence means more than a scintilla of evidence. Substantial evidence is such evidence that a reasonable person might accept as adequate to support a conclusion. Bogle v. Sullivan, 998 F.2d 342, 346-47 (6<sup>th</sup> Cir. 1993) (citing Kirk v. Sec’y of Health & Human Servs., 667 F.2d 524, 535 (6<sup>th</sup> Cir. 1981), cert. denied, 461 U.S. 957 (1983)). Under the substantial evidence standard, the reviewing court does not try the case de novo, resolve conflicts in the evidence, or

review credibility. Cutlip, 25 F.3d at 286; Hogg v. Sullivan, 987 F.2d 328, 331 (6<sup>th</sup> Cir. 1993). In evaluating whether substantial evidence exists, the reviewing court must take the record as a whole. Id. (citing Allen v. Califano, 613 F.2d 139, 145 (6<sup>th</sup> Cir. 1980)). The reviewing court must take into account whatever evidence detracts from the decision under review. Id. (citing Beavers v. Sec’y of Health, Educ. & Welfare, 577 F.2d 383, 387 (6<sup>th</sup> Cir. 1978)). Even if the reviewing court would decide the case differently, if there is substantial evidence in support of the decision, it should be affirmed. Cutlip, 25 F.3d at 286; Bogle, 998 F.2d at 347. In other words, an administrative decision should not be reversed even if substantial evidence would have supported the opposite conclusion. Smith v. Chater, 99 F.3d 780, 781 (6<sup>th</sup> Cir. 1996).

### **III. Analysis**

Plaintiff alleged disability based on status post sinusitis surgery, a history of gastroesophageal reflux disease, chronic pulmonary disease, adult onset asthma, and degenerative disc disease of the spine. Pl. Br. at 17. The ALJ agreed that “as of December 31, 1996, [Plaintiff] had degenerative disc disease of the spine and a history of gastroesophageal reflux disease, was post sinusitis surgery, and probably had chronic obstructive pulmonary disease, which produced more than a minimal effect on the ability to perform work activity.” Tr. at 20. However, the ALJ found that Plaintiff’s “impairments did not, singly or in combination, meet or equal a listed impairment contained in Appendix 1 to Subpart P of Regulation No. 4.” Id. The ALJ further found that Dr. Shull’s opinion that Plaintiff was unable to perform any type of work was “out of proportion” with the objective medical evidence in the case. Tr. at 22. Specifically, the ALJ relied heavily on the opinion of Dr. Crockarell, one of Plaintiff’s treating physicians, who diagnosed Plaintiff with degenerative disc disease, but noted that clinical tests revealed that the disease had not substantially deteriorated her

motor and reflexive functions. Id. Accordingly, the ALJ upheld the denial of Plaintiff's application for a period of disability and disability benefits on the grounds that Plaintiff was not disabled within the meaning of the Social Security Act. Tr. at 22-23. After reviewing the record below and for the reasons set forth herein, the Court holds that the ALJ's decision must be affirmed.

The ALJ stated that while it is true that Plaintiff underwent endoscopic sinus surgery on April 23, 1996, "her condition apparently improved after surgery." Tr. at 22. When Plaintiff visited Dr. Wong on May 2, 1996 with complaints of a sore throat and hoarseness, Dr. Wong noted that Plaintiff's sinuses were "wide open" and that her throat was "clear." Tr. at 194. Dr. Wong also noted that Plaintiff "ha[d] been doing much better." Id. As for Plaintiff's lung problems, the ALJ conceded that Plaintiff "is currently being treated for chronic obstructive pulmonary disease which was probably present in December 31, 1996." Tr. at 22. Furthermore, the medical evidence supports Plaintiff's testimony that she has adult onset asthma. Tr. at 52, 262. However, Plaintiff testified, and the ALJ noted, that during 1996 she was smoking at least one to two packs of cigarettes per day. Tr. at 52, 139, 182, 194, 205-206. This undermines Plaintiff's claims that either of the lung conditions constitute disabling conditions within the meaning of the Social Security Act. Sias v. Sec'y of Health & Human Servs, 861 F.2d 475, 480 (6<sup>th</sup> Cir. 1988) (claimant's choice to "drive himself to an early grave" by smoking and exacerbating his respiratory condition undermined claimant's complaint that respiratory condition constituted a disability); Mullins v. Sec'y of Health & Human Services, 836 F.2d 980, 984 (6<sup>th</sup> Cir. 1987) (ALJ's conclusion that claimant's heavy smoking habit militated against a finding of disabling pulmonary condition was proper).

With respect to Plaintiff's stomach problems, the ALJ noted that Plaintiff's complaints to a doctor about her stomach were described as "nonspecific." Tr. at 22, 139. Most significantly, the

Court observes that nowhere does Plaintiff allege that any of the above conditions inhibited her ability to perform her job as an employee in Triple A's membership or insurance departments. Accordingly, the Court finds that there is substantial evidence to support the ALJ's finding that Plaintiff's status post sinusitis surgery, history of gastroesophageal reflux disease, chronic pulmonary disease, and adult onset asthma, singly or in combination, do not constitute disabilities within the meaning of the Social Security Act.

The crux of Plaintiff's appeal as it relates to degenerative disc disease is that the disease caused pain so extensive that it disabled her and rendered her unable to work. Pl.'s Br. at 21-22. Plaintiff relies heavily on the opinion of Dr. Shull to support this contention. *Id.* at 9-11, 19. In the Sixth Circuit, "subjective complaints of pain may support a claim of disability." Duncan v. Sec'y of Health & Human Servs., 801 F.2d 847, 852 (6<sup>th</sup> Cir. 1986). When a plaintiff asserts a disability due to pain, credibility determinations with respect to the claimant's complaints of pain are left to the ALJ. *Id.* Furthermore, a claimant must meet both parts of a two-prong test in order to demonstrate disabling pain: "First [the court] must examine whether there is objective medical evidence of an underlying medical condition. If there is, [the court] then examine[s]: (1) whether objective medical evidence confirms the severity of the alleged pain arising from the condition; or (2) whether the objectively established medical condition is of such a severity that it can reasonably be expected to produce the alleged disabling pain." *Id.* at 853.

Title 20 of the Code of Federal Regulations, Part 404, Subpart P, Appendix 1, §1.04 states that in order to prove disorders of the spine, "e.g. ... degenerative disc disease," a claimant must provide:

(A) Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss ... accompanied by sensory or reflex loss and, if there is involvement of the lower back, possibly straight leg testing (sitting and supine); or

(B) Spinal arachnoiditis, confirmed by an operative note or pathology reports of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every two hours; or

(C) Lumbar spinal stenosis resulting in pseudoclaudication, established by findings of appropriate medically acceptable imaging manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively.

The ALJ acknowledged that Plaintiff has degenerative disc disease. Thus, Plaintiff must present evidence that the disease existed at such a severe level that it caused her disabling pain. The Court finds that Plaintiff did not meet this burden.

In October 1996, Dr. Crockarell noted that there were “no overt findings for radiculopathy.” Tr. at 22. Dr. Crockarell further found that Plaintiff had excellent shoulder motion, fairly normal cervical motion, no major pain reproduced by range of motion testing, and no motor deficit. Tr. at 22. Additionally, Plaintiff’s reflexes were “preserved in the lowers, preserved in the uppers and [were] symmetric.” Id. In addition, the Court notes that MRI testing in 1998 revealed that Plaintiff’s “cervical spine [was] intrinsically normal [with] . . . very mild canal stenosis.” Tr. at 224. Furthermore, Plaintiff’s “lumbar vertebral bodies and disc spaces [were] well-maintained in good alignment ... [with] mild central disc bulge at L3-4 without focal HNP or other significant finding at this level ... and without focal HNP, canal stenosis or significant neural foraminal narrowing.” Id.

Furthermore, Plaintiff has not presented an operative note or pathology reports confirming spinal arachnoiditis. Moreover, the 1998 MRI revealed that Plaintiff had only mild stenosis in her

cervical spine and no stenosis in her lumbar spine. Finally, Plaintiff offered no medical evidence demonstrating that from 1991 to 1996 she was unable to ambulate effectively, e.g. that she was extremely limited in her ability to walk. 20 C.F.R., Part 404, Subpart P, Appendix 1, §1.00(B)(2)(b)(1). Thus, the Court finds that there was substantial evidence to support the ALJ's conclusion that, although Plaintiff suffered from degenerative disc disease, the disease had not reached the level of severity which would result in a disabling degree of pain by December 31, 1996.

Plaintiff asserts that the ALJ was unjustified in ignoring Dr. Shull's opinion that Plaintiff was disabled and unable to work because of pain arising from her ailments, and that this inability to work had existed for "some extensive period of time." The Court disagrees. The ALJ specifically found that Dr. Shull's "opinion was out of proportion to the weight of the evidence as of December 31, 1996." Tr. at 22. The vast majority of medical evidence is based on reports from Plaintiff's treating physicians. These evaluations of Plaintiff are entitled to greater deference than Dr. Shull's because Dr. Shull is a nontreating physician. Cf. Shelman v. Heckler, 821 F.2d 316, 321 (6<sup>th</sup> Cir, 1987) ("the opinion of a nonexamining physician is entitled to little weight if it is contrary to the opinion of the claimant's treating physician") (internal citations omitted). Furthermore, Dr. Crockarell's opinion that Plaintiff had excellent shoulder motion, fairly normal cervical motion and no major pain reproduced by range of motion testing is highly persuasive evidence that Plaintiff's condition did not prevent her from working because it was contemporaneous with the period of alleged disability, and it was based on the performance of a motor skills test. Dr. Shull's evaluation was retrospective, "short and routine," and excluded a test of Plaintiff's motor skills. Tr. at 262.

In addition, Dr. Shull's opinion, as it relates to Plaintiff's spine, is inconsistent with the 1998 MRI, which both Dr. Crockarell and Dr. Buckley agreed was the best way to evaluate the extent of

damage to Plaintiff's spine. Moreover, Dr. Shull's December 1998 statement that Plaintiff's condition existed for "some extensive period of time" is vague and does not indicate that disabling pain existed as early as December 31, 1996. Finally, both of the medical consultants agreed that Plaintiff could work under certain circumstances. Plaintiff does not dispute the validity of the medical consultants' findings. Accordingly, the Court finds that the ALJ's decision that Plaintiff was not disabled within the meaning of the Social Security Act must be affirmed.

**IV. Conclusion**

For the foregoing reasons, the ALJ's decision is **AFFIRMED**.

**IT IS SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2003

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**BERNICE BOUIE DONALD**  
**UNITED STATE DISTRICT JUDGE**